



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **APR 29 2015**

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(15)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

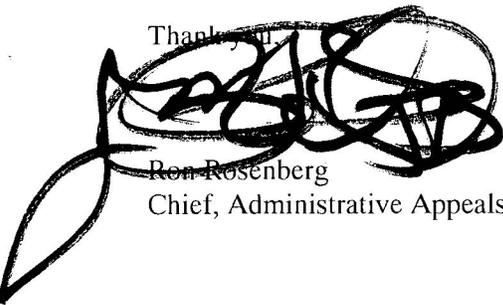
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The service center director ("the director") denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an 18-employee "Application Development and Integration, Technology Solutions, and Product Platforming" business established in [REDACTED]. In order to employ the beneficiary in what it designates as a "Programmer Analyst" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition determining that the evidence of record did not establish that the job offered here is a specialty occupation. On appeal, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements.

The record of proceeding before this office contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Notice of Appeal or Motion (Form I-290B), a brief and supporting documentation. We reviewed the record in its entirety before issuing our decision.¹

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

The petitioner stated on the Form I-129 petition that it seeks the beneficiary's services as a programmer analyst to work onsite on a full-time basis at an annual salary of \$60,000. In a letter, dated October 14, 2011, the petitioner stated that it "provides technology solutions, application integration and product platforming for a broad range of clients by identifying their business problems and delivering the right solutions." The petitioner noted that it offers services in custom application development and that its custom offerings include financial services/capital markets solutions, business intelligence and data integration, identity management and information security, healthcare and life sciences technology integrations. The petitioner described the proffered position and the beneficiary's role as follows:

[T]he Beneficiary would be responsible for analyzing, designing, developing, and implementing complex software and software systems using various software technologies in order to determine design feasibility within time and cost constraints. He would also be responsible for the design, development, and testing of preliminary and conceptual designs through various levels of analyses. Furthermore, the Beneficiary would be required to work with professional hardware and systems engineers to evaluate interface between hardware and software and to design and develop the operational and performance requirements of the overall computer

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

system to ensure it meets the necessary technological needs necessary in the engineering industry.

The Beneficiary's responsibilities will include, but are not limited to the following duties:

1. Utilize well-developed knowledge of software technologies including but not limited to SharePoint, MOSS, WSS, SQL, CSS, HTML Java Script and MS Project Server to design, develop code (software program) and implement software applications;
2. Evaluate, maintain and support various online applications, including Server Systems and deploy internet based applications for use in connection with information systems;
3. Convert data from project specifications and statements of problems and procedures to create, modify, and test computer programs;
4. Analyze workflow charts and diagrams, apply knowledge of requirements analysis, design, test, and implement software applications, knowledge transfer/user training activities, computer capabilities, subject matter, and symbolic logic;
5. Compile and write documentation regarding program development and subsequent revisions;
6. Deploy program codes into computer system and client communication concerning new program codes;
7. Observe and debug computer system to interpret software program operating codes;
8. Correct program errors using methods such as modifying program or altering sequence of program steps; and
9. Analyze review, and rewrite programs to increase operating efficiency or to adapt programs to new requirements.

The petitioner also noted that the beneficiary would spend 30 percent of his time on "Analysis of software requirement and programming"; 15 percent of his time on "Evaluation of interface feasibility between hardware and software"; 30 percent of his time on "Software system design (Using scientific analysis and mathematical models to predict and measure design consequences and future outcome)"; 10 percent of his time on "Unit and Integration testing"; 10 percent of his time on "System Installation"; and 5 percent of his time on "System maintenance."

The petitioner noted further that the beneficiary would be expected to work on the in-house "[REDACTED] project" which was in the preliminary stage of development. The petitioner then stated that the beneficiary, in the position of programmer analyst, "is expected to make a valuable contribution in the finalization of the [REDACTED] project" so that the petitioner can market the application to end-users.

The petitioner added that some of the beneficiary's specific duties on the project would be to:

- Develop mobile application modules using Visual Studio and Sharepoint Designer for real time resource planning and scheduling of health care service providers;
- Develop Web Services for communication between [REDACTED] and other client functions;
- Design and implement the Hibernate/JPA for the Persistence Layer;
- Design WSDL's and schemas and implement the Web Services; and
- Develop adapters in J2EE to connect with all different type of external system and exchange the different type of data.

In the initial letter in support, the petitioner also set out its requirements to perform the proffered position as follows:

In order to perform the complex job duties described above, the Programmer Analyst must apply an in-depth knowledge of computer science principles and their application. Because it involves the theoretical and practical application of a specialized body of knowledge, the Petitioner requires at least a Bachelor's degree, or the equivalent, in Computer Science, Engineering, Technology, or a related field for this position.

The petitioner set out a summary of its terms of an oral agreement with the beneficiary, wherein the petitioner and the beneficiary agreed that the beneficiary would work as a "Programmer Analyst," for a period beginning October 19, 2011 to September 30, 2014, at a rate of \$60,000 per year, and that the agreement would be void if H-1B approval was not obtained. The petitioner indicated that the beneficiary is qualified to perform services in the proffered position and that he has obtained a Bachelor of Technology in Information Technology from [REDACTED], in India. The petitioner provided the beneficiary's diploma, transcript and an evaluation of the beneficiary's foreign credentials stating that his degree is equivalent to a Bachelor's of Science degree in Information Systems from a regionally accredited college or university in the United States.

The petitioner provided a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification "Computer Programmer" - SOC (ONET/OES) code 15-1131, at a Level I (entry level) wage.

In support of the Form I-129, the petitioner submitted an eight-page document providing an overview of its "[REDACTED]" project. The petitioner claimed that the beneficiary would be the "Microsoft Subject Matter Expert to augment the technical team that [the petitioner] is building to gain traction in the **Health Care practice ...**" The petitioner also identified two "Team Models" for Phase II of the project with each team requiring three resources and completing their portion by August and October 2012 and a diagram showing that Phase 3 would begin thereafter. The petitioner provided another list of the beneficiary's duties relating to the project as follows:

- Development of the [REDACTED] application. If using [REDACTED] then [the beneficiary] will use ASP.NET, VS 2010, AJAX,

- Silverlight 4.0, WPF in tandem with SharePoint (MOSS 2010) and Project Server technology stack
- Chalking out the road map and the plan for rebuilding the application in [REDACTED] and SharePoint (MOSS 2010)
 - Utilize InfoPath Form services to convert forms into web based forms to allow corporate users to easily fill out form data within the SharePoint library.
 - Design and implement Dashboard functionality using Excel services by enabling, activating appropriate features and establishing data connections to SQL server.
 - Develop the MOSS portal for [REDACTED] leveraging WSS for document management and collaboration
 - Perform typical administrative activities such as backup, restore, site creation and also implemented workflows through SharePoint API and SharePoint Designer 2007/2010.
 - Design and implement Data Grid Web Parts and their connections displaying data that is pulled from Microsoft SQL Server database utilizing Business Data Catalog features.
 - Deploy custom web parts with custom proprieties using Visual Studio 2010
 - Implement Event Handlers for both synchronous and asynchronous events and deployed them on the server.
 - Implement CAML to queries across and manipulate the SharePoint sites and lists.
 - Install and activate Features, developed custom features and implemented Event Handlers for feature events in SharePoint and C#
 - Created the blue print for design and development of the next version of [REDACTED]
 - Develop the user interfaces in ASP.NET and the process workflow components for launching brands and indicators using C#

The initial record also included the petitioner's corporate documents, its lease, a company synopsis, a list of its hardware and software inventory, and its employee benefits package.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE. The director requested that the petitioner submit probative evidence to establish eligibility for the benefit sought, and outlined the evidence to be submitted, including evidence that the petitioner had specialty occupation work available for the entire requested H-1B validity period and copies of a position description that described the skills required to perform the job offered, the tools needed to perform the job, and the product to be developed or the service to be provided, among other things.

In a letter, dated June 12, 2012, in response to the RFE, the petitioner provided the same list of general duties as set out in the eight-page document relating to the [REDACTED] project, deleting however, the performance of "typical administrative activities" and noting that the beneficiary would "Create" the blueprint for design and development of the next version of [REDACTED] rather than indicating the blue print had already been "Created." The petitioner also included a proposed list of five employees, by name, to work on the [REDACTED] application project in the positions of programmer

analyst (3), business analyst, and software quality assurance engineer. The beneficiary is not identified on the list. The list does not identify any particular phase of the project or module these individuals are working or will be working on for the petitioner's [REDACTED] project.

The petitioner included a copy of preliminary sample software code for the [REDACTED] project, sample screen shots of the [REDACTED] project, an illegible copy of the petitioner's time estimation for construction, design and testing of JAVA components, among other things, a 27-page chart providing additional undecipherable information regarding the "Microsoft" project, a sample employee performance evaluation document, copies of the petitioner's Internal Revenue Service (IRS) Forms 1120, U.S. Corporate Income Tax Return, for 2010 and 2011, copies of the petitioner's employer's quarterly tax returns, photographs of the petitioner's offices, and previously submitted documentation.

The director reviewed the information provided in the initial H-1B filing and in response to the RFE. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner did not establish eligibility for the benefit sought and denied the petition.

On appeal, the petitioner asserts that there is a bona fide programmer analyst position available for the beneficiary, the [REDACTED] application project is a viable project and the petitioner has potential clients who have expressed an interest in the software, and that the petitioner has sufficient H-1B work available for the beneficiary for the requested validity period. The petitioner submits additional documentation in support of its assertions.

II. SPECIALTY OCCUPATION

The issue here is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, including the evidence submitted on appeal, and for the specific reasons described below, we agree with the director and find that the evidence does not establish that the position as described constitutes a specialty occupation.

A. The Law

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and

- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d at 387. To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

B. Analysis

To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

One consideration that is necessarily preliminary to, and logically even more foundational and fundamental than the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has provided substantive information and supportive documentation sufficient to establish that, in fact, the beneficiary would be performing services for the type of position for which the petition was filed. Another such fundamental preliminary consideration is whether the petitioner has established that, at the time of the petition's filing, it had secured non-speculative work for the beneficiary that corresponds with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position. We find that the

petitioner has failed in each of these regards.

First, the petitioner certifies on the LCA that the proffered position falls within the occupational classification of a "Computer Programmer" SOC (ONET/OES) code 15-1131; but refers to the proffered position as a "Programmer Analyst." As will be discussed below, the general descriptions submitted regarding the proffered position are insufficient to establish whether the beneficiary will primarily perform programming duties, or whether his role will primarily involve the duties of a computer systems analyst.² We observe that the correct occupational classification for a programmer analyst who will design and update a system's software, create applications, and code and debug software, etc. is SOC (ONET/OES) code 15-1121.³ The occupation of a computer systems analyst in ██████████ New Jersey, when the petition was filed, requires a higher wage than that of a computer programmer in the same location.⁴

Second, the petitioner has provided a generic overview of the beneficiary's proposed duties. Although the petitioner provides an overview of the duties of the proffered position and three

² Although the petitioner did not attest that the proffered position falls within the occupational classification of "Computer Systems Analyst" on the submitted LCA, the Department of Labor's *Occupational Outlook Handbook's* chapter on computer systems analysts, includes a brief description of a programmer analysts position. In this chapter, the *Handbook* states that programmer analysts design and update their system's software and create applications tailored to their organization's needs. They do more coding and debugging than other types of analysts, although they still work extensively with management and business analysts to determine what business needs the applications are meant to address. Other occupations that do programming are computer programmers and software developers. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-2> (last visited Apr. 15, 2015).

³ It is noted that, where a petitioner seeks to employ a beneficiary in two distinct occupations, the petitioner should file two separate petitions, requesting concurrent, part-time employment for each occupation. While it is not the case here, if a petitioner does not file two separate petitions and if only one aspect of a combined position qualifies as a specialty occupation, USCIS would be required to deny the entire petition as the pertinent regulations do not permit the partial approval of only a portion of a proffered position and/or the limiting of the approval of a petition to perform only certain duties. See generally 8 C.F.R. § 214.2(h). Furthermore and as is the case here, the petitioner would need to ensure that it separately meets all requirements relevant to each occupation and the payment of wages commensurate with the higher paying occupation. See generally 8 C.F.R. § 214.2(h); U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. Thus, filing separate petitions would help ensure that the petitioner submits the requisite evidence pertinent to each occupation and would help eliminate confusion with regard to the proper classification of the position being offered.

⁴ The submitted LCA lists the prevailing wage for the designated occupational category at a Level I wage as \$55,245 per year in ██████████ New Jersey. The prevailing wage for the occupational category of "Computer Systems Analysts" at a Level I wage is \$61,526, in ██████████ New Jersey when the petition was filed. <http://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1131> ██████████ &year=12&source=1 and <http://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1121> ██████████ &year=12&source=1 (last visited Apr. 15, 2015).

additional versions of the beneficiary's duties as they allegedly relate to the petitioner's application project, the record does not include probative information allocating the beneficiary's time to any specific module of the petitioner's claimed project, or his expected duties relating to specific modules of the project. Other than identifying that three programmer analyst resources will be committed to certain modules, and would complete their portion of the project by August and October 2012, the petitioner has not provided specifics regarding the beneficiary's actual duties. Additionally, other than noting that phase 3 will continue thereafter, and that the beneficiary "is expected to make a valuable contribution in the finalization of the application project," the petitioner does not provide additional and specific detail regarding the beneficiary's actual role in the project. For example, although the petitioner provided an overview of three of its current programmer analysts' duties relating to the project, the petitioner did not identify which if any of these duties, the beneficiary would also perform. As noted above, this overview does not indicate what phase or what module the three current programmer analysts are working on. Although the construction, design and testing of JAVA components and the 27-page chart listing estimates of "Microsoft" resources may relate to the petitioner's claimed project, the petitioner has not identified the beneficiary's role or the duration of that role with specificity in this regard.

We have reviewed the organizational chart for the project submitted by the petitioner on appeal which depicts a project manager who has two lead programmer analysts and a technology liaison reporting to him.⁵ The lead programmer analysts have two programmer analysts on their team and the technology liaison is depicted as supervising an undefined number of technical recruiters and resource managers. The organizational chart does not include individuals in the positions of business analyst and software quality assurance engineer, positions previously identified as part of the project. Moreover, the organizational chart does not fully correspond to the individuals previously identified as working on the project and it does not update or list the particular tasks that each of the "programmer analysts" are performing or would perform in relation to the project. It is not possible to ascertain from the broad and generic information provided regarding the petitioner's project the actual number of resource hours dedicated to each phase of the project and the resources' specific duties related to the project. Further, the petitioner does not identify on appeal, the current stage of the project. The record, including the organizational chart submitted on appeal, lacks substantive information regarding the continued viability of work to be performed on the project and evidence that any work to be completed requires the knowledge of a specialty occupation worker as the term is interpreted according to the applicable statutes and regulations.

Notably, as referenced above, the petitioner does not provide detailed information regarding the beneficiary's expected duties as those duties relate specifically to this project. Other than indicating generally that the beneficiary will utilize third party software in working on the petitioner's project, the petitioner is not specific and detailed regarding the beneficiary's actual day-to-day tasks. That is, to the extent that they are described, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the performance of the

⁵ The chart identifies the project manager, the two lead programmer analysts, and one other programmer analyst by name. Only one individual identified on the organizational chart is included in the petitioner's list of resources previously identified by name. Again, the beneficiary's name is not included on the chart.

proffered position for the entire period requested. The job descriptions do not persuasively support the claim that the position's day-to-day job responsibilities and duties would require the theoretical and practical application of a particular educational level of highly specialized knowledge in a specific specialty directly related to those duties and responsibilities. The overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's operations. Thus, the petitioner has not demonstrated how the performance of the duties of the proffered position, as described by the petitioner, would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.

Upon review of the totality of the record, the petitioner has not provided substantive information and supportive documentation sufficient to establish that, in fact, the beneficiary would be performing services primarily as a "computer programmer" or a "programmer analyst." The petitioner has not established the nature of the proffered position and in what capacity the beneficiary will actually be employed within the petitioner's business operations. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Accordingly, the record lacks substantive evidence establishing that, at the time the petition was filed, the petitioner had secured non-speculative work for the beneficiary that corresponds with its claims regarding even the general nature of the work it described in its submitted position description. That is, other than the identified project, the petitioner provided no evidence that it had work for the beneficiary to perform. Again, without supporting documentary evidence, the petitioner has not met its burden of proof. *Id.* As noted above, the documents submitted regarding the claimed project do not establish with probative evidence that the project will require the requested three years of H-1B classification to complete. As the petitioner in this matter has not provided documentary evidence substantiating the beneficiary's actual work for the duration of the requested period, we cannot conclude that the petitioner has established that it will employ the beneficiary in a specialty occupation for that period.

Upon review, it is not evident that the proposed duties as described, and the position that they comprise, merit recognition of the proffered position as qualifying as a specialty occupation. That is, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Thus, the petitioner has not established that the proffered position is a specialty occupation under the applicable provisions.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. We affirm the director's determination that the petitioner has not provided a description of the actual work the beneficiary will perform and has not established that it has sufficient H-1B work for the requested period of intended employment. For this reason, the appeal will be dismissed and the petition denied.

The material deficiencies in the evidentiary record are decisive in this matter and they conclusively require that the appeal be dismissed. However, we will continue our analysis in order to apprise the petitioner of additional deficiencies in the record that would also require dismissal of the appeal.

Assuming for the sake of argument that the proffered duties as generally described by the petitioner are duties falling with the occupational classification of a computer programmer, the position the petitioner attests is the position most closely related to the proffered position would in fact be the duties to be performed by the beneficiary, we will analyze them and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation.

We turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

As previously mentioned, the petitioner asserts on the LCA that the proffered position falls under the occupational category "Computer Programmers." We recognize the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁶ We reviewed the chapter of the *Handbook* entitled "Computer Programmers" including the sections regarding the typical duties and requirements for this occupational category.⁷ However, the *Handbook* does not indicate that "Computer Programmers" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. The subchapter of the *Handbook* entitled "How to Become a Computer Programmer" states the following about this occupational category:

Most computer programmers have a bachelor's degree in computer science or a related subject; however, some employers hire workers with an associate's degree. Most programmers specialize in a few programming languages.

Education

⁶ All of our references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

⁷ For additional information regarding the occupational category "Computer Programmers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Computer Programmers, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-2> (last visited Apr. 15, 2015).

Most computer programmers have a bachelor's degree; however, some employers hire workers who have an associate's degree. Most programmers get a degree in computer science or a related subject. Programmers who work in specific fields, such as healthcare or accounting, may take classes in that field to supplement their degree in computer programming. In addition, employers value experience, which many students gain through internships.

Most programmers learn only a few computer languages while in school. However, a computer science degree gives students the skills needed to learn new computer languages easily. During their classes, students receive hands-on experience writing code, debugging programs, and doing many other tasks that they will perform on the job.

To keep up with changing technology, computer programmers may take continuing education and professional development seminars to learn new programming languages or about upgrades to programming languages they already know.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Computer Programmers, available on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited Apr. 15, 2015).

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for these positions. Rather, the *Handbook* indicates that an associate's degree is also an acceptable avenue to attain a position as a computer programmer. We also observe that "most" is not indicative that a computer programmer position normally requires at least a bachelor's degree, or its equivalent, in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)), or that a computer programmer position is so specialized and complex as to require knowledge usually associated with attainment of a baccalaureate or higher degree in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)).⁸

When reviewing the *Handbook*, it also must be noted that the petitioner designated the proffered

⁸ The first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of computer programmer positions require at least a bachelor's degree in computer science or a closely related field, it could be said that "most" computer programmer positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Section 214(i)(1) of the Act.

position as a Level I (entry level) position on the LCA.⁹ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance."¹⁰ A Level I wage rate is described as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

Thus, in designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. Based upon the petitioner's designation of the proffered position as a Level I (entry) position, it does not appear that the beneficiary will be expected to serve in a senior or leadership role. As noted above, according to DOL guidance, a statement that the job offer is for a research fellow, worker in training or an internship is indicative that a Level I wage should be considered.

⁹ Wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

¹⁰ Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding and as stated by the petitioner do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we will review the record of proceeding regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. The petitioner, in this matter, also has not submitted evidence from the industry's professional association indicating that it has made a degree a minimum entry requirement. The record does not include any evidence that the position of a "computer programmer" requires a bachelor's or higher degree in a specific specialty, or its equivalent. Further, the record does not demonstrate that such a requirement is common to the petitioner's industry in positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner.

Thus, based upon a complete review of the record of proceeding, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner. Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be

performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted letters from prospective clients, a claimed in-house project, and copies of portions of uncertified federal tax returns for 2010 and 2011.

However, a review of the record of proceeding indicates that the petitioner has not demonstrated the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the petitioner has not established why a few related courses or industry experience alone is insufficient preparation for the proffered position. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.¹¹

The petitioner has indicated that the beneficiary's educational background will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself qualifies as a specialty occupation. In the instant case, the petitioner does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner fails to demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

¹¹ This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. As noted above, the certified LCA for this position indicates a wage level at a Level I (entry level) wage. This wage level only requires a basic understanding of the occupation; the performance of routine tasks that require limited, if any, exercise of judgment; close supervision and work closely monitored and reviewed for accuracy; and the receipt of specific instructions on required tasks and expected results.

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, USCIS reviews the petitioner's past recruiting and hiring practices, information regarding employees who previously held the position, as well as any other documentation submitted by a petitioner in support of this criterion of the regulations.

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. According to the Court in *Defensor*, "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388. If USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position – and without consideration of how a beneficiary is to be specifically employed – then any alien with a bachelor's degree in specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.*

Further, the petitioner accepts a degree in the general field of "Engineering" as adequate to perform the duties of the proffered position. The issue here is that the field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, is closely related to a computer programmer position or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter. The petitioner, who bears the burden of proof in this proceeding, fails to provide sufficient evidence to establish that (1) computer science, engineering (including any and all engineering specialties), and technology are closely related fields, or (2) a degree in engineering (including any and all engineering specialties) is directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty*, or its equivalent, for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

We recognize that the petitioner desires an employee with a strong background in various software

technologies. However, the petitioner does not substantiate that only a bachelor's degree in the various fields of computer science, engineering and general technology would provide the knowledge to perform the duties it ascribes to the proffered position. Notably, the petitioner does not include probative evidence of its requirements for the other computer programmers it has hired. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The record does not include evidence that the proffered position satisfies this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. Furthermore, we also reiterate our earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties.

The petitioner has not established that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. We, therefore, conclude that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

III. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.